CHAPTER 19

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19.1 RISK EXISTS; BUT IT IS LOW

In our litigious society lawsuits are common. It is the price we pay for open access to the courts. It is one thing to file a suit, however. It is another thing altogether to win a financial recovery. As this chapter will discuss, there are important legal rights at stake for both children and family members in child protection. Yet, the legislature and the courts recognize the fundamental importance of child protection and foster care and have extended immunity to child welfare professionals against all but grossly negligent or reckless behavior.

19.2. FUNDAMENTAL LIBERTY INTERESTS AT STAKE

Child protection investigations are, by their very nature, an invasion of personal privacy and civil liberties of parents and children. In child protection, government agents inquire and intervene into the most private relations between parent and child --often without court supervision or authority. Despite this threat to personal liberty, our state and federal laws give considerable discretion and protection to caseworkers and others who follow established procedures for child protection investigations. Our laws reflect a societal concern that children be protected from harm and a public policy choice that family privacy must yield to child protection concerns. Nonetheless, workers and others need to be constantly and carefully aware that child protection actions have the potential to violate family privacy and other constitutionally protected liberty interests of parents and children. Workers should respect the family privacy and integrity of their clients as a matter of good professional practice.

Parents have a fundamental liberty interest in the care, custody, and management of their children.[1] This liberty interest has also been called a "right of privacy", particularly in the areas of freedom of choice in intimate matters such as marriage and childbearing.[2] The family itself is not beyond regulation in the public interest, however.[3] Parents' privacy interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.[4] Children themselves have rights in this process. Children

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1. *Santosky v Kramer*, 455 US 745 (1982)
2. *Harris v McRae* 448 US 297, reh den 448 US 917 (1980)
3. *Moore v City of East Cleveland*, 431 us 494 (1977)
4. *Prince v Massachusetts*, 321 US 158, 166 (1944); Myers v Morris, 810 F2d 1437 (8th Cir. 1987)

have a constitutional right to be protected from harm when in foster care.[5] Workers should proceed cautiously, out of respect for the families involved, but also because serious violations of civil rights could result in legal liability.

19.3. POTENTIAL LIABILITY

Theoretically a child welfare caseworker could be sued for a range of possible shortcomings, including deprivation of civil rights, violation of a statutory duty, and professional malpractice. In *Williams v. Coleman*[6] the Michigan Court of Appeals upheld a $900,000 judgement against DSS foster care workers who failed to report a case of suspected child abuse and neglect to child protective services. Foster care workers have a duty under the child protection law to file such reports, the court said.

Individuals may be sued for unauthorized disclosure of client confidences. An abrogation of privilege and confidentiality in child protection cases based on the child protection law does not necessarily extend to other legal proceedings. The legal theories that have been found to support such action are:

(1) a breach of implied contract of secrecy;[7]
(2) a breach of statutory duty to preserve confidences of a client;[8]
(3) a tort of defamation;[9] and
(4) a tort of Invasion of Privacy.[10]

Nevertheless, the chances of lawsuit being successfully brought for unauthorized disclosures of confidential information remain slight. First, a plaintiff would have to show that a duty of confidentiality existed. We have reviewed at length the considerable exceptions and possible waivers to any duty of confidentiality. Second, the plaintiff would have to show that an existing duty was breached or violated. Third, the plaintiff would have to show that the breach of duty, i.e., unauthorized release of confidential information actually was the cause of measurable damages.[11]

Risks of a lawsuit are also increased by communication of inaccurate information that raises the possibility of suit for defamation. Thus, information communicated orally and in written form must be accurate.

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5 *Meador v. Cabinet for Human Resources*, 902 F 2d 474 (6th Cir. 1990)

6 *Williams v. Coleman*, 194 Mich App 706 (1992)

7. *Doe v. Roe*, 400 NYS2d 668 (1977); *Clark v. Garaci*, 208 NYS2d 564 (1960); *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965)

8. See, e.g., *Doe v. Roe*, *id.*

9. 73 ALR2d 325

10. 20 ALR3d 1109

11. *Id.*

Note also that a criminal misdemeanor penalty may attach to anyone who permits or encourages unauthorized dissemination of information in protective services reports and records.[12] Any person, including a protective services worker, who improperly discloses the name of the person filing a report of suspected child abuse or neglect may also be held criminally liable.[13]

Therefore, the risk of legal liability for breach of confidentiality, although present, is not substantial. Ethics, a sense of fair play, and respect of clients' integrity and privacy is more likely to motivate human services professionals to carefully control the dissemination of private information about their clients than is the formal sanction of law.

19.4. IMMUNITY FROM FEDERAL LAW CLAIMS

Balanced against the theoretical possibilities of lawsuits is the fact that child protection workers and, to a somewhat lesser extent, foster care workers, are extended considerable immunity from lawsuits. The rationale for this protection is that social workers should not feel intimidated in their important work of protecting children from harm. If social workers were constantly fearful of being second-guessed through lawsuit, their capacity to protect children from harm could be adversely affected.

As to potential federal law liability, even if the legislature chose to do so, state law cannot protect against violations of federal constitutional rights and such federal suits in child welfare are not uncommon. When child protection caseworkers have been sued for alleged violations of federal civil rights, federal courts have extended an absolute immunity from suit for acts that are judicial or prosecutorial in nature -- such as filing and prosecuting petitions in juvenile court[14] and seeking immediate apprehension of a newborn from her natural mother.[15]

Federal courts have not extended absolute immunity for federal civil rights claims for investigatory and administrative acts.[16] In *Achterhof v. Selvaggio* the court held that opening a child abuse case, investigating it and placing a parent's name in the central registry concerning child abuse are not quasi-prosecutorial activities for which absolute immunity applies. Rather these activities are administrative or

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12. MCL 722.633

13. Id., Op. Atty. Gen. 1980, No. 5915, p. 1075

14. *Salyer v Patrick*, 874 F2d 374 (6th Cir. 1989), (social workers filing a juvenile abuse petition which resulted in a temporary emergency custody order were entitled to absolute immunity); Kurzawa *v Mueller*, 732 F2d 1456 (6th Cir 1989), (social workers involved in prosecuting neglect and delinquency petitions in the Michigan courts leading to the removal of a child from his parents' home were entitled to absolute immunity as was the guardian ad litem; Accord, *Vosburg v. Department of Social Services*, 884 F 2d 133 (4th Cir. 1989); *Hoffman v. Harris*, 7 F 3rd 233 (6th Cir. 1994), *cert.den.* 114 S.Ct. 1631, (Justices Thomas and Scalia dissenting).
Achterhof v. Selvaggio 886 F2d 826 (6th Cir 1989).

15 *Coverdell v. Department of Social and Health Services*, 834 F 2d 758, 764 (4th Cir. 1989)

16. *Achterhof v. Selvaggio* 886 F2d 826 (6th Cir 1989)

investigative. The court extended *qualified immunity* to the defendants in *Achterhof.* Qualified immunity means that the defendant would only be held liable upon proof of violating a "clearly established statutory or constitutional right of which a reasonable person would have known,"[17] or, if the law is not clearly established, and the alleged violation was undertaken in good faith, upon proof of gross negligence or deliberate indifference to a known risk and a violation of clear standards of law.[18]

A social worker for a *private agency* was extended qualified immunity in a South Dakota case in which a child sued for violation of civil rights when she was separated from her father as a result of investigation and subsequent neglect legal proceedings.[19] The federal appeals court for the Sixth Circuit, which includes Michigan, has also extended qualified immunity to private agency staff.[20]

The worker's vulnerability to suit is greater in foster care cases where children enjoy a clearly established right to be protected from harm.[21] "The cases analogize the state's role in placing children in foster homes to the mental institution and prison settings in which state liability has been clearly established for 'deliberate indifference' to the plight of individuals in detention."[22]

The U.S. Supreme Court rejected the proposition that the state owes an affirmative constitutional duty to protect a child *not* in state custody.[23] In *DeShaney,* the Wisconsin child protective services left Joshua DeShaney in the custody of his father who inflicted irreparable brain injury on the child. Because Joshua was not in state custody and even though there was an active CPS investigation, the U.S. Supreme Court held that the state had no affirmative constitutional duty to protect one citizen from another unless the citizen is in government custody. Although *DeShaney* precludes suits against CPS for failure to protect a child based on constitutional rights violations, it does not preclude suits where failure to remove a child was grossly negligent nor does it preclude a constitutional rights case against an agency responsible for supervising a foster home.

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17 *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)

18 *Doe v. NYC Dept of Social Services,* 649 F2d 134, 146. See also *K.H. v. Morgan,* 914 F2d 846 (7th Cir. 1990) (Illinois child welfare workers not entitled to qualified immunity from liability for placing child in custody of foster parent state knew or suspected to be a child abuser.) *Rippy v Hattaway,* 270 F.3d 416 (6th Cir. 2001) (Tennessee child welfare workers entitled to absolute immunity from liability for refusing to return child to parent after it was determined that it was safe to do so.)

19 *Lux v. Hansen,* 886 F2d 1064 (8th Cir. 1989)

20 *Bartell v Lohiser,* 215 F.3d 550 (6th Cir. 2000)

21 *Meador v. Cabinet for Human Resources,* 902 F 2d 474 (6th Cir. 1990); *Norfleet v. Arkansas Dept of Human Services,* 989 F2d 289 (8th Cir. 1993); Taylor *v. Ledbetter,* 818 F2d 791 (11th Cir. 1989)

22 *Lintz v. Skipski* 25 F.3d 304; 1994. But see *Artist M. v. Suter,* 112 S.Ct. 1360 (1991) in which the U.S. Supreme Court held that the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, does not create rights enforceable in an action under s 1983 nor does it create an implied private cause of action. The suits on behalf of foster children are based on other legally imposed duties and not federal funding statutes.

23 *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1980)

19.5. IMMUNITY FROM STATE LAW CLAIMS

First, the child protection law provides for immunity from civil or criminal liability for persons acting in good faith under the act:

> *** A person acting in good faith, who makes a report, cooperates in an investigation, or assists in any other requirement of this act shall be immune from civil or criminal liability, which might otherwise be incurred thereby. A person making a report or assisting in any other requirement of this act shall be presumed to have acted in good faith. This immunity from civil or criminal liability extends only to acts done pursuant to this act and does not extend to a negligent act which causes personal injury or death or to the malpractice of a physician which results in personal injury or death.[24]

Michigan law also provides immunity from tort liability for government employees in the course of employment:

> Each employee of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the employee, while in the course of employment, if all of the following are met:
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> (a) The employee is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (c) The employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.[25],

Notice that the legislature has not protected government employees from “gross negligence”, however. The difference between “gross negligence” and “ordinary negligence” comes across in this classic example. Assume that Driver D (D is for distracted) is proceeding down a busy street at the posted speed limit, say 35 mph, and momentarily loses concentration. Maybe Driver D is listening to the radio or thinking about whether the Tigers might ever have a winning season again. Driver D runs a red light and causes an accident. Pretty dumb. The behavior is negligent -- but not necessarily reckless or grossly negligent. This level of negligence is called “ordinary negligence”. Now compare Driver B (B is for beer) who after two six packs decide to proceed down the same busy street at 75 mph – 40 mph over the posted limit. At the same intersection Driver B whizzes through the red light and also causes an accident. Driver B’s behavior is beyond ordinary negligence. It is grossly negligent or reckless. It is reckless behavior of

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24. MCL 722.625; See also *Awkerman by Awkerman v Tri-County Orthopedic Group*, P.C. (1985) 143 Mich App 722.
25. MCL 691.1407(20

this sort, demonstrating a substantial lack of concern for whether an injury results, that is not protected against and could expose a worker to liability.

In *Martin v Children's Aid Society,*[26] the Michigan Court of Appeals extended *absolute immunity to a private agency* under contract to the Michigan DSS. The court recognized that many federal courts had extended absolute immunity to child protection caseworkers for suits alleging deprivation of constitutional rights under 42 USC 1983. The court noted that basis of the plaintiffs' case in *Martin* was not a federal claim, but state law claims, but it adopted the reasoning of the federal cases cited above in extending the protections to private agencies. The rationale is worthy of an extended quote here:

> Federal appellate courts have extended absolute immunity to social workers initiating and monitoring child placement proceedings and placements in cases similar to the instant case. *Babcock v Tyler*, 884 F.2d 497 (CA 9, 1989); Vosburg *v Dep't of Social Services*, 884 F.2d 133 (CA4, 1989); Coverdell *v Dep't of Social & Health Services*, 834 F.2d 758 (CA9, 1987*); Meyers v Contra Costa Co Dep't of Social Services*, 812 F.2d 1154 (CA 9, 1987); Kurzawa *v Mueller*, 732 F.2d 1456 (CA 6, 1984).
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> These precedents recognize the important role that social workers play in court proceedings to determine when to remove a child from the home and how long to maintain the child in foster care. They also recognize that, to do that difficult job effectively, social workers must be allowed to act without fear of intimidating or harassing lawsuits by dissatisfied or angry parents. *Kurzawa*, supra at 1458.
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> Caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision . . . There is little sense in granting immunity up through adjudication . . . and then exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders. *Babcock*, supra at 503.]
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> Accord *Coverdell*, supra at 765 ("To permit the [social] worker to become 'a lightning rod for harassing litigation . . .' would seriously imperil the effectiveness of state child protection schemes.").
> ***
> When a court is involved, granting immunity from civil suit does not mean that the parents of a child taken from their home are without recourse to contest wrongful conduct by a social worker. "The parent of the apprehended child is not left remediless--he or she may always attack the court's order directly or on appeal." Id. Accord *Vosburg*, supra at 136

[26] *Martin v Children's Aid Society* 215 Mich App 88, 544 NW2d 651 (1996)

("Safeguards against . . . misconduct were built into the . . . adjudication process itself.").

Although we have found no Michigan precedent regarding this question, we find convincing the decisions granting absolute immunity to social workers. As the CAS defendants persuasively point out in their brief, absolute immunity is necessary to assure that our important child protection system can continue to function effectively:

> No more heinous act can be alleged than the physical abuse of a helpless infant by an adult. The volatile mix of accused parents, deprived of the custody of the baby, observing it in the care of foster parents, finding themselves in the unfamiliar confines of the court system, required to retain counsel at great cost, subject to the social services bureaucracy and its necessary interrogation and probing of the most intimate aspects of the family psyche, is almost guaranteed, rightly or wrongly, to produce resentment and a desire for retribution by the parent. Many parents in this situation are seriously psychologically disturbed.
>
> Professional assistance to the Probate Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children. Its advisors and agents cannot be subject to potential suits by persons, aggrieved by the Court's decision vindictively seeking revenge against the Court's assistant as surrogates for the jurist. Faced with such liability, the social worker would naturally tend to act cautiously and refrain from making difficult decisions, delay in intervening to protect the child, avoid confronting the aggressive parent with the necessity of changing his attitudes and seeking psychiatric help to do so. Such an atmosphere defeats the function of the continuing jurisdiction of the Probate Court in the abstract, and in reality poses the potential for death for an abused child who is not protected because the social worker exercised excessive caution in arriving at a judgment as to whether there is sufficient evidence of abuse to merit action on his or her part.
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> Mere qualified immunity is not enough protection to prevent the chilling effect of a potential suit on the exercise of a social worker's professional judgment and discretion in operating as an arm of the Probate Court to protect abused children. This litigation is vivid proof of that. Judge Stephens has ruled that Cross-Appellants have qualified immunity, but that has not prevented years of litigation. The threat of a suit like this one could make any

social worker back off from making discretionary decisions that he or she would otherwise believe to be in the child's best interest.[27]

19.6. WHAT TO DO IF YOU ARE SUED

Although the risk of successful lawsuit against child welfare workers is not great, the risk is not reduced to zero and workers and their agencies must know and carefully abide by the legal limits of their power to investigate and intervene in families.[28] If you are sued for an activity that is within the scope of your employment with the state, the Attorney General will represent you and does so very vigorously. If your conduct was within the scope of your employment, the state will pay damages if they are ordered. If you are faced with the possibility of a suit, consult the Administrative Handbook, Item 1100 for instructions.

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[27] Id. at 95-97

[28]. See "Governmental Immunity for the Child Care Social Worker: Has Michigan Gone Too Far for Too Little?" 5 Cooley L. Rev. 763 (1988)